Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

HILL DERMACEUTICALS, INC.,
Petitioner,

v.

Rx SOLUTIONS, UNITED HEALTH GROUP, INC., and UNITED HEALTHCARE OF FLORIDA, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Exercise of the Court's conflict jurisdiction under Supreme Court Rule 10(a) where the Eleventh Circuit Court of Appeals affirmed a second removal by interpreting the last served defendant rule under 28 U.S.C. § 1446(b) (2006) to apply even after the case had already been remanded back to State Court by the district court which then allowed a later served, but related defendant, to remove the same case a second time, a decision which directly conflicts with the decisional interpretations of the statute by other Circuit Courts of Appeal. Some Circuits adopt the First Served Defendant rule. The Eleventh Circuit, based upon an unsupportable Record, adopted in conflict to other Circuits the last served defendant rule allowing a second removal when the First Served Defendants previously removed the exact same case, but which case was then remanded to the State Court before the second removal.

LIST OF ALL PARTIES AND CORPORATE DISCLOSURE PER RULE 29.6

1. Plaintiff, Hill Dermaceuticals, Inc., a Florida corporation, a 100% owned privately held closed corporation. No public corporation owns 10% of more of the stock of Hill Dermaceuticals, Inc.
2. Jerry S. Roth (principal stockholder in Hill Dermaceuticals, Inc.)
3. Susan G. Roth (principal stockholder in Hill Dermaceuticals, Inc.)
4. Larry M. Roth, Esquire, attorney for Petitioner and a Member of the Supreme Court Bar.
5. United Healthcare of Florida, Inc., a wholly-owned subsidiary of United Healthcare, Inc., which is then a wholly-owned subsidiary of United HealthCare Services, Inc. United Healthcare Services, Inc. is, finally, a wholly-owned subsidiary of United Health Group Incorporated, a publicly-traded company, and Respondent (last served defendant).
6. Rx or Prescription Solutions is a wholly-owned subsidiary of PacifiCare Health Systems, LLC, which in turn is a wholly-owned subsidiary of United Health Group Incorporated, the Respondent (last served defendant).
7. United Health Group Incorporated, a publicly-traded company.
8. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.A., attorneys for Respondents

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CITATIONS OF COURT REPORTED DECISIONS

The United States Circuit Court of Appeals' opinion is unpublished at 2008 WL 5237155. (App.1) That decision was an appeal from various Orders and Opinions by the United States District Court, Middle District of Florida, Orlando Division, reported at 2008 WL 2359898; 2008 WL 343290; and 2008 WL 1744794.

CONCISE STATEMENT FOR BASIS OF JURISDICTION

This Petition for Writ of Certiorari is based on conflict jurisdiction because of inconsistent and non-uniform decisions of the various Circuit Courts of Appeals:

1. To exercise conflict jurisdiction to resolve Circuit Court split of authority whether First Served Defendant or last served defendant rule applies to 28 U.S.C. § 1446(b) (2006).
2. To exercise conflict jurisdiction to establish a uniform, reliable, repeatable and one rule of law under 28 U.S.C. § 1446(b) as to what circumstances, after service, a defendant may remove a case in order to prevent this uncertainty in the law, inconsistent results, and unfairness to this Petitioner, and all State court plaintiffs.
    a) The Eleventh Circuit in the subject case improperly followed the last served defendant rule by affirming a second removal of the same case (by a related defendant) which had already been previously remanded to the State court by the district court after removal by the First Served Defendants.
    b) The Eleventh Circuit erred by finding, contrary to its own statement of law, that the district court reconsidered its earlier Remand Order even though the district court specifically held it did not have

jurisdiction to reconsider any remand order.

3. To exercise its supervisory powers over the lower courts which, under the circumstances of this case, those orders, holdings and rulings so far departed from the accepted and usual course of judicial proceedings.

This conflict jurisdiction exists to resolve inconsistent Circuit Courts of Appeals' decisions interpreting the First and last served defendant rule for purposes of diversity of citizenship under 28 U.S.C. § 1441 (2006), *et seq.* The issue here creating the conflict of Circuit Court decisions occurred when the Eleventh Circuit held, even after the two first served defendants removed this case to federal district court, then that court ordered a Remand to State court, that a subsequently served, but previously named and related defendant in the federal court amended complaint, was permitted to remove the same case back to the same district court for a second time despite that subject matter jurisdiction had been released to the State court by the earlier entered Order of Remand. The Eleventh Circuit's decision herein has caused conflict within the Circuits, which in turn has created a lack of uniformity within the Circuits, and inconsistent results for State court plaintiffs and defendants. Without a uniform interpretation of the First Served and last served defendant rules under the Removal Statute by this Court, the law in the Circuit Courts of Appeal will remain inconsistent, variable, unfair, unpredictable, and for those Circuits wherein the issue has even yet to be decided, this same inconsistent and unpredictable legal uncertainty exists at the district court levels.

The second aspect of the Eleventh Circuit's improper decision was that they misapplied the last served defendant rule to an undisputed fact situation where the lawsuit had already been once removed and then remanded. Therefore, the theoretical basis for the last

defendant served rule was not applicable to the facts on this undisputed Record.

The Eleventh Circuit's Judgment was entered December 17, 2008. (App. 1) (Dkt. 47) (Case No. 330) A Petition for Re-Hearing was filed by Hill. (App. 2) The Petition rehearing was denied, without comment, on January 21, 2009. (App. 3). This Petition for Writ of Certiorari by Hill was filed within 90 days thereafter, as required by Rule 13.1. The Court has jurisdiction to consider this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1) (2006). Supreme Court Rules 29.4(b) and (c) are not applicable to this proceeding.

APPLICABLE STATUTES INVOLVED IN THIS CASE

1. 28 U.S.C. § 1446(b):

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

2. 28 U.S.C. § 1447(c) (2006):

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under Section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed to the clerk of the State court. The State court may thereupon proceed with such case.

3. 28 U.S.C. § 1447(d) (2006) provides "[a]n order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise . . ."

CONCISE STATEMENT OF THE FACTS

This case is procedurally postured for certiorari review as the district court dismissed Petitioner Hill's lawsuit at the complaint pleading stage (although improperly—everyone just missed the issues and evidence without understanding this type of prescription drug related litigation)[1], which the Eleventh Circuit affirmed in its

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[1] Illegal or improper drug substitutions by managed care companies have arisen to become a major national health safety concern. Consumer advocates throughout the Nation are warning in a series of news articles that many health insurers, like subject Respondents, are using misleading tactics to steer patients toward inappropriately substituted cheaper medicines and the results can be very harmful to patients. In letter after letter (the leading news organizations warn us) managed care health insurers mount a correspondence campaign telling patients that they can save $30-$65 a month if they opt to use a "generic" alternative. For many of the drugs listed in these letters there are no FDA approved generic alternatives. The "generics" would put the patient on an entirely different medication. A lot of patients do

entirety. (App. 1). That affirmance was partly based on the holding that the last served defendant rule had been adopted by the Eleventh, and therefore the district court, contrary to what other Circuits have ruled, had jurisdiction.

If certiorari is granted, and the Eleventh Circuit reversed, the contended erroneous procedural and substantive Orders entered by the district court would be null and void. *See* (Dkt. 40) (Case No. 330) This was apparent by the district court denying all jurisdictional discovery, and not allowing regular discovery to proceed before ruling on a 12(b)(6) motion despite a CMO allowing such discovery. (*See* Dkt. 18 – Case 2032 [seeking discovery] and Dkt. 33—Case Management Order in Case No. 330). If reversed, Petitioner Hill would then be free to pursue its otherwise valid State claims in its choice of forum, State Court.

Petitioner, Hill Dermaceuticals, Inc. (hereinafter "Hill") is a privately owned, small manufacturer of specialized and unique dermatological products for which it owns various New Drug Applications (NDA). Its products have no generic or bioequivalent therapeutic substitutes or equivalents. Hill is located in Seminole County, Florida with its manufacturing and research facilities there, and is a Florida corporate citizen. Hill owns NDAs for *Derma-Smoothe/FS® (Body Oil)* and *Derma-Smoothe/FS® (Scalp*

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not understand that the managed care organizations are forcing patients to switch to an entirely different drug that has a different chemical composition and completely different side effects for the patient.

See Robyn Sheldon, *Health Insurers Push Generics –What Are Patients Getting?* Orlando Sentinel, March 8, 2009, at A1.

Carolyn Poirot, *When Generic Substitution May Not Be Best,* Fort Worth Star-Telegram, April 19, 2000, *available at* 2000 WLNR 1269819.

Ray Long & Christi Parsons, *Bill is Targeting Panel's Review of Generic Drugs,* Chicago Tribune, May 7, 1999, *available at* 1999 WLNR 6855495.

Oil). Both products are approved by the FDA for different unique disease indications (that is approved for a specialized and unique way to medically treat certain specified diseases. They are used as a methodology of clinical treatment by medical doctors, and Hill's prescription drugs are the only approved drugs by the FDA for this type of treatment for the pervasive aspects of the chronic diseases of scalp psoriasis, atopic dermatitis, and eczema treatment for widespread body application). The (Body Oil) is for eczema and atopic dermatitis with widespread body coverage of the diseases. The (Scalp Oil) is for scalp psoriasis.

Approval by the FDA for "indications" means approval for use on specific diseases. To require alleged substitution of Hill's prescribed products for these specific diseases is illegal under Florida law, Fla. Stat. § 465.025 (2008) (the basis of the underlying lawsuit) (App. 7, 9). Respondents characterized, unfortunately to an overly receptive district court, an intentional minimization of eczema and atopic dermatitis as minor "skin irritations" to justify their illegal drug substitutions imposed on doctors and pharmacists. (Dkt. 23, at 3) (Case No. 330) (But see contra Dkt. 15, Ex. B) (No. 2032) (Photos of the chronic and pervasive nature of skin dermatitis.) On the contrary, eczema and atopic dermatitis are chronic illnesses and serious skin diseases. Approximately 20% -25% of the population suffer from atopic dermatitis; 27 million people in the United States have the disease. *See,* MedicineWorld.Org, (http://medicineworld.org/medicine/allergy/allergy-statistics.htlml), (last visited April 8, 2009). Ten percent (10%) to fifteen percent (15%) of children suffer from the disease.[2] It is a chronic, ugly disease, which has both physiological and emotional residual effects.

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[2] L. F. Schultz, *The Epidemiology of Atopic Dermatitis,* 31 Monogr Allergy, 9-28 (1993).

Hill's product, *Derma-Smoothe/FS® (Scalp Oil),* is FDA-approved for psoriasis, a severe and chronic disease of the scalp. Hill's (Scalp Oil) is the only drug (therefore unique) approved by the FDA for use under occlusion (or covering). (See Dkt. 39) (Case No. 330) In addition, Hill's *Derma-Smoothe/FS® (Body Oil)* and *(Scalp Oil)* are, which is not in dispute, the referenced drugs identified by the FDA for the treatment of eczema, atopic dermatitis, and psoriasis according to the "Orange Book"[3], which in the industry is essentially the Bible of the FDA. Hill's *Derma-Smoothe/FS® (Body Oil),* for example, is the only FDA-approved drug to be used for the medical treatment of eczema and atopic dermatitis on widespread disease applications where up to 50 to 90% of the body is involved. (Dkt. 39) (Case No. 330)

It is an undisputed fact in this Record there was no therapeutic equivalent drug, or even a generic substitute approved by the FDA for either of these two Hill prescription products. Therefore, no pharmacist, healthcare provider, managed care drug company, or pharmacy benefit manager (PBM), like Respondents (Rx Solutions, UHF and UHG) (the drug plan payor and insurer), could legally under State law require substitution of other products for those of Hill's. Yet, Respondents were doing precisely that. This is what is also undisputed in the lawsuit. (Dkt. 7-4, Exh. C, Wells Affidavit) (No. 2032); (Dkt. 7-5, Exh. D; Doering Affidavit) (No. 2032)[4]

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[3] Health and Human Svcs. Dept., Food and Drug Admin., *Approved Drug Products with Therapeutic Equivalence Evaluations ("Orange Book"), available at* www.accessdata.fda.gov/scripts/cder/ob/docs/temptn.cfm.

[4] The district court bought, hook, line and sinker that the case was about Hill trying to get on Respondent's formulary. (Dkt. 40-4) (Case No. 330). But Respondent's claim Hill's products are on the lowest tier of their formulary. And under Medicare they overcharge the U.S. Government $68 for a retail $48 drug. *See* App. 6, at pages 8, 10.

Hill has no generic drugs substitutable for either its (Body Oil) or (Scalp Oil) products, nor is there any therapeutic equivalents approved by the FDA for Petitioner's products, facts which were critical to the underlying suit. In other words, both Hill's *Derma-Smoothe/FS® (Body Oil) and (Scalp Oil)* are unique FDA approved drugs which are prescribed as medically necessary, and intended to be used for medical treatment by healthcare providers for these potentially serious skin diseases involving, for example, widespread body atopic dermatitis, eczema, and psoriasis of the scalp.

The first two served Respondents, Rx Solutions, and United Healthcare of Florida (the putative non-diverse defendant) are ultimately owned and part of a multi-billion dollar corporate group organization of the "last served" Respondent, United Health Group (hereafter UHG). Its corporate ownership chart, which includes Rx and UHF, is a jigsaw puzzle of labyrinth corporate structures that is, at a minimum, dizzying to even look at. (Dkt. 13-3, at pgs. 4-8) (Case No. 330) UHG was the so-called last served defendant who removed this same case a second time.

Hill began to learn of various illegal Medicare substitutions by subsidiaries of United Health Group (UHG), and specifically in Florida where one of the UHG companies, Rx or Prescription Solutions, alleged to have a contract with UHF, the insurer and the non-diverse defendant, were not paying for and illegally substituting patients', physicians' and healthcare providers' prescriptions for Hill's unique (Body Oil) and (Scalp Oil) products. These substitutions by Respondents were not, it was alleged by Hill, nor could they be, with drugs that were either generic or therapeutic substitutes for *Derma-Smoothe/FS®* since none existed. Respondents were achieving these putative improper substitutions by sending out letters to, among others, dermatologists, refusing to pay for Hill's products when prescribed, and instead allegedly required use of one of three other prescription

drugs that were not therapeutic bioequivalents or generics to Hill's products, but were part of Respondents' captive and preferred formulary. (App. 11 – Dr. Coverman's Affidavit) These letters also formed the basis of Hill's allegations of defamation, misleading information, and outright falsehoods upon which the lawsuit was based. (App. 7, 9).

Hill filed its original Complaint in the State court, in and for the Eighteenth Judicial Circuit, Seminole County, Florida on November 16, 2007. (App. 7) Even though there was a Florida Defendant sued, United Healthcare of Florida (UHF), the First Served Defendants, Rx and UHF, both Respondent UHG corporately owned, filed a Notice of Removal of the State court case on December 27, 2007. (Dkt. 1) (Case No. 2032) (App. 8) This was given Case Number 6:07-CV-2032-Orl-31GJK. As is typical of the Middle District of Florida, the court entered a Related Case Order and Track II Case Requirements for Discovery on December 28, 2007. (Dkt. 3) Thereafter, Rx Solutions and UHF filed a Motion to Dismiss Hill's Complaint (Dkt. 14) (Case No. 2032) on January 17, 2008. On January 29, 2008, Hill timely filed its Motion for Remand, Memorandum of Law, and Alternative Request for Jurisdictional Discovery. (App. 8) (Dkt. 18) (Case No. 2032) This included a request for jurisdictional discovery based upon the fact that a lack of jurisdiction and fraudulent joinder had been raised as to the non-diverse nature of UHF by these First Served Defendants. (App. 8) (See Dkt. 1 – Case No. 2032)

The district court, consistent with its pattern of punitive rulings against Hill, never permitted jurisdictional discovery. The district court in fact denied Hill's every request to conduct jurisdictional or other discovery before dismissing the entire case with prejudice, while still at the pleadings stage under Rule 12(b)(6). (Dkt. 40) (Case No. 330)

The district court, while Hill's Motion for Remand was pending, but before a response was due by the First Served Defendants—Rx and UHF—to respond and oppose the Remand, dismissed on technical grounds Hill's initial Complaint, on February 5, 2008, without prejudice to amend. (Dkt. 23) (Case No. 2032) While this was going on, pursuant to the Middle District of Florida Local Rules, the attorneys were meeting and conferring to develop a Joint Case Management Report for the Court. In a timely fashion, also on February 20, 2008, Hill then filed its Amended Complaint. (App. 9) (Dkt. 27) (Case 2032)

Despite the fact that Local Rules required the First Served Defendant to oppose a Motion within ten (10) days, M.D.L.R. 3.01(b), Rx and UHF never responded to the Motion for Remand, although there was no Order or attorney agreement allowing them to forego timely responding to the jurisdictional Motion to Remand. In fact, the First Served Defendants, Rx and UHF, knew they had a lawsuit on their hands as they during this same time frame brought in *pro hac* their D.C. attorneys. (Dkt. 24) (Case No. 2032) This was consistent with the fact that the case was still active in the Middle District, and the parties were meeting and conferring on a Joint Management Report. Additionally, Petitioner's Amended Complaint (App. 9) had already been filed while the clock was still ticking on Respondents' opposition filing to Remand. Yet, there was no opposition ever filed to Hill's Motion for Remand. Also, this was despite the fact that five (5) days had already elapsed since the filing of Hill's Amended Complaint on February 20, 2008 (which added UHG, the ultimate parent of Rx and UHG, as a party), and yet Rx and UHF still filed no opposition to Hill's Motion to Remand.

The district court remanded to the Circuit Court in and for the Eighteenth Judicial Circuit, Seminole County, on February 25, 2008. (App. 3) (Dkt. 28) (Case No. 2032) Under the Local Rules of the Middle District if a response

is not filed the Motion is granted, and presumed to have been unopposed on the substantive issues. M.D.L.R. 3.01. The next day, on February 26, 2008, in case 2032, the First Served Defendants, United Healthcare of Florida and Rx, frantically filed a desperate, but dilatory, Motion and Memorandum of Points and Authorities for Reconsideration, or in the Alternative for the Court to Vacate its Remand Order of February 25, 2008. (Dkt. 29) (Case No. 2032) This was opposed by Petitioner Hill. (Dkt. 30) (Case No. 2032) The district court properly denied the Motion for Reconsideration on February 29, 2008. (App. 4) (Dkt. 31) (Case No. 2032)

The Amended Complaint (App. 9), as noted, was essentially the same as the original Complaint (App. 7) in terms of the claims for relief, including Rx Solutions and the non-diverse defendant, UHF, still present to defeat diversity of citizenship. Only the ultimate parent corporation, Respondent United Health Group, Inc., was added. (Compare App. 7 and App. 9.) UHG was added simply because the district court required it in its Order dismissing the original Complaint, without prejudice, on February 6, 2008. (Dkt. 23) (Case No. 2032) The claims against UHG were no different in terms of substance due to the alleged corporate incestuous relationship between Rx and UHF, both UHG owned companies.

Despite these facts, UHG when served with the Amended Complaint in State court by Petitioner Hill, after the same case had already been remanded to State court jurisdiction, and subsequent to the filing of the Amended Complaint while this case was still in the district court on February 20, 2008, 5 days before the first Remand (App. 3, 9) (Case No. 2032), removed the case to district court once again, but subsequent to the first Remand to State court. Administratively, the district court clerk gave this second removed case a different case number from the first remanded lawsuit. (App. 9) (No. 330 instead of No. 2032)

Hill timely filed its (Second) Motion to Remand. (Dkt. 7) (Case No. 330)

The two original First Served Defendants, United Healthcare of Florida and Prescription Solutions, already having removed then had the case remanded and were still in the lawsuit after the first remand was granted, consented to the Second Removal, despite the case was lodged jurisdictionally in the State court. The district court then wrongly denied Remand. (App. 5) (Dkt. 34) (Case No. 330) The district court adopted the last served defendant rule, which really should not have even applied to a case which had already been removed, but then remanded.

The Eleventh Circuit on appeal, and on this Record, held that the last served defendant rule applied, and affirmed the district court action. (App. 1) This created direct conflict between the Eleventh Circuit and other Circuit Courts of Appeal on which principle applied to a defendant's Removal—the First Served defendant rule, or the last served defendant rule.

Symptomatic of the Eleventh Circuit's numerous errors and misunderstanding of this entire case—procedural and substantive—was their improperly calling Hill's products "ointments" when in fact they are "oils" (a liquid), as medically defined by the FDA, thereby ignoring Hill's rehearing petition. (App. 6) Neither the district court nor the Eleventh Circuit ever wanted to understand any aspect of this case. (App. 11, Dr. Coverman Affidavit)

WHY CERTIORARI MUST BE GRANTED CIRCUIT COURT CONFLICTS AND INCONSISTENT RESULTS FOR STATE PLAINTIFFS ON STATUTORY REMOVAL RULE.

This appeal started after the district judge had granted a remand, and then later ignored that decision retaining federal jurisdiction of the case for which it did not possess, which had been earlier remanded, by adopting the latter served rule to sustain its Order denying Remand. Because of this action, the question then becomes whether an Order

remanding a case to State court, which was granted on an unopposed motion to remand (App. 3, 4, 8), can be reconsidered by the district court on a second removal using the previous same arguments, at least as framed by the Eleventh Circuit. The Petitioner would argue the answer is clearly "no".

> An order remanding a case to the State court from which it is removed is not reviewable on appeal or otherwise. 28 U.S.C. § 1447(d). Where a district court remand order is based on subject matter jurisdiction as contemplated by § 1447(c), it is unquestioned that '§ 1447(d) not only forecloses appellate review, but also bars reconsideration. . .by the district court [of its own remand order].'

Jasmin v. J.C. Penney Corp., No. 08-20429-civ, 2008 WL 709637 (S.D. Fla. March 14, 2008) citing *Harris v. BlueCross/BlueShield of Alabama, Inc.*, 951 F.2d 325, 330 (11th Cir. 1992). Allowing the latter served defendant rule would clearly violate 28 U.S.C. § 1447(d), and create a complex and contradictory interpretation of the Removal Statutes.

It is the overall role of this Court to unify and rule so that federal statutory law is consistent, uniform, and equally applied by all courts within its supervisory power. Therefore, under Rule 10(a) this Court's certiorari jurisdiction authority must resolve the various Circuit Court conflicting decisions interpreting sections 1446(b) and (c) of Title 28 on when a defendant can remove an otherwise properly filed State court litigation to federal district court—whether it must be the First Served Defendant, or the last served defendant (even when one or more earlier served defendants did not, for whatever reason, remove from State to federal court).

This issue is straightforward and direct for this Court to resolve. More importantly, it will bring uniformity and consistency to the federal removal statutory scheme, eliminating inconsistent results, depending upon the

jurisdiction in which State court a plaintiff files, and establish fairness for a State plaintiff, such as Petitioner Hill, to avoid otherwise, in the future, egregious results like here on an undisputed factual Record before the Court. Why is that?

Herein, the First Served two Defendants (Rx and UHF) did timely remove the matter to federal district court. Thereafter, once an Amended Complaint had been filed in the district court, Petitioner's Motion to Remand was granted. Then scrambling due to their inexplicable failure to timely oppose the properly pending Motion to Remand filed by Hill, these First Served two Defendants (Rx and UHF) filed a Motion for Reconsideration—i.e., keep this case in federal court. This was in case 2032, the same case in which an Amended Complaint was then pending. (App. 9; Dkt. 29 – Case 2032) That Motion for Reconsideration was denied. (App. 3)

Accordingly, the federal district court completely divested itself of any jurisdiction over this litigation in accordance with the granting of Petitioner's unopposed Motion to Remand. The State court then re-acquired jurisdiction, with proper purview resting undisputedly in that court. Unlike what the Eleventh Circuit ruled, federal court involvement should have ended there. But it didn't. Later in the State court proceeding, once the corporate conglomerate, United Health Group was served—the ultimate corporate owner of the First two Served Defendants who had already once attempted to remove the case, which in turn was remanded—it again removed the same Amended Complaint, previously existing in the first case No. 2032 before Remand, to the very same district court. Not even the same case number in district court was given to what was essentially the exact same case and operative complaint which previously existed in the same district court Case No. 2032, but now for a Second Removal was designated as Case No. 330. (App. 3, 7, 9)

It is from the Eleventh Circuit's affirmance of the denying of Petitioner's remand motion in this second removal (Case No. 330) which presents both the certiorari issue, and the opportunity to correct that Circuit's injustice due to its extreme departure from the essential requirements of the law, but also, once and for all, establish a uniform mandate on which both plaintiffs and defendants can rely as to when a case must and only can be removed against a State court plaintiff to federal court.

The issues for this Court include exercise of its supervisory jurisdiction to correct an improper ruling by the Eleventh Circuit which permitted an already once remanded case to State court to be successfully later removed in the exact same case by a corporately related defendant to the first served defendants who previously removed, under the aegis of the last served defendant rule. This fact pattern is not a valid or fair interpretation of even the last served defendant practice. Moreover, it abrogates any strictly construed limitation on First, last or any served defendant to remove. This gross departure of the law by the Eleventh Circuit has to be addressed by this Court.

Secondly, giving Respondents the benefit of the doubt, *arguendo,* their actions by the last served defendant, United Health Group, who removed the previously remanded case to the same district court—only after the district court told Hill to include UHG in the Amended Complaint filed in the first removed case, then remanded that case to State court—establishes for certiorari jurisdictional purposes the jurisdictional tension to finally resolve the otherwise irreconcilable conflict between the Circuits on which rule of law applies to removal cases.

ARGUMENT

It is undisputed that the statutory federal removal laws must be strictly construed, and construed against removal. *See, e.g., Univ. of South Alabama v. American Tobacco Co.,* 168 F.3d 405, 411 (11th Cir. 1999). The last

served defendant rule, and this undisputed factual Record, instead create a liberal interpretation and an ignoring of strict construction.

When there are multiple defendants, all defendants must join in the removal petition. The United States Supreme Court adopted this unanimity rule over a century ago. *Chicago, Rock Island & Pacific Railway Co. v. Martin*, 178 U.S. 245, 248 (1900). The unanimity rule guarantees that any one defendant may prevent a case from being removed. The courts have always, at least with lip service, strictly construed the removal statutes against removal jurisdiction. Any doubt is to be consistently resolved in the favor of remanding the case. 28 U.S.C. §§ 1332, 1441; *Univ. of South Alabama*, 168 F. 3d at 411; *Hill v. Blind Indus. & Services of Maryland,* 179 F.3d 754, 757 (9th Cir. 1999) (removal and remand are governed by strict time limits).

Uncertainty, inconsistency, and non-uniform application of the statutory provisions of Title 28 on Removal must, therefore on this Record, be addressed by the Highest Court of the Land. If certiorari is granted, substantively this Petitioner will seek *imprimatur* of the First Served Defendant rule, particularly upon this undisputed Record. But on a higher legal plane of resolving this Circuit Court split in the law, the Supreme Court must step in and straighten out the subject case's broken procedural litigation path.

The federal courts are undisputedly divided on whether to follow the First Served Defendant Rule, or the last served defendant rule. Both federal circuit courts, and even intra-circuit district courts are split on what rule to follow. In fact, within all Circuits only five (5), the Fourth, the Fifth, the Sixth, the Eighth, and the Eleventh Circuits have decided this issue. Even within the Eleventh Circuit, prior to *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1205 (11th Cir. 2008), there was a hodge-podge of decisions on this issue. The Middle District Court of Florida, from where the subject case arose, followed the

First Served Defendant Rule, while the last served defendant rule was followed by other district judges, even within the same district, including the lower court below. *See, e.g., Diebel v. S.B. Trucking Co.*, 262 F. Supp. 2d 1319, 1327 (M.D. Fla. 2003) (First Served Rule).

This is not an intra-Circuit problem that plagued only the Eleventh Circuit until recently. There is a sharp inter-Circuit divergence. The Fifth and Seventh Circuits appear to follow the First Served Defendant Rule. The Fourth, Sixth, Eighth and Eleventh Circuits follow the last served defendant rule. Remaining Circuit Courts of Appeal do not have any well defined rule one way or the other. For example, the Third Circuit appears to follow a hybrid or intermediate rule as they call it; or, either there is no Circuit ruling at all. See, *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986); *Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352, 354 (7th Cir. 2000); *McKinney v. Board of Trustees of Mayland Comm. Coll.*, 955 F.2d 924 (4th Cir. 1992); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999); *Marano Enter. of Kansas v. Z-Teca Restaurants, L.P.*, 254 F.3d 753 (8th Cir. 2001).

Moreover, district courts, without Circuit Court or this Court's instruction, are deciding this issue inconsistently and without uniformity. One can now only speculate about the result by a State court plaintiff. Many of the district courts are following the "First Served Defendant Rule": *see Phoenix Container, L.P. ex rel. Samarah v. Sokoloff*, 83 F. Supp. 2d 928 (N.D. Ill. 2000) (First Served Defendant Rule); *Cellport Systems, Inc., Peiker Acustic GMBH & Co. KG*, 335 F. Supp. 2d 1131 (D. Colo. 2004) (First Served Defendant Rule); *Auchinleck v. Town of LaGrange*, 167 F. Supp. 2d 1066 (E.D. Wis. 2001) (First Served Defendant Rule); *Biggs Corp. v. Wilen*, 97 F. Supp. 2d 1040 (D. Nev. 2000) (First Served Defendant Rule). Yet, others adopt the last served defendant rule, some even within the same Circuit where sister district courts adopted the contrary

Rule: *See Ratliff v. Workman,* 274 F. Supp. 2d 783 (S.D.W.Va. 2003) (last served defendant rule); *Shadie v. Aventis Pasteur, Inc.*, 254 F. Supp. 2d 509 (M.D. Pa. 2003) (last served defendant rule); *Piacente v. State Univ. of New York at Buffalo*, 362 F. Supp. 2d 383 (W.D.N.Y. 2004) (last served defendant rule); *Orlick v. J.D. Carton & Son, Inc.*, 144 F. Supp. 2d 337 (D.N.J. 2001) (last served defendant rule). It is a jurisdictional traffic gridlock. For example, compare *Smola v. Trumbull Ins. Co.*, 317 F. Supp. 2d 1232 (D. Colo. 2004) district court in the Eighth Circuit following the First Served Defendant Rule) with *Hartford Steam Boiler Inspection & Ins. Co. v. Riviera Electric LLC*, No. 05-cv-01797-WYD-MEH, 2006 WL 1046962 (D. Colo. Apr. 19, 2006), another district court in the same Eight Circuit following the last served defendant rule.

The opinion of the Eleventh Circuit is even further flawed in that its holding, following an earlier decision adopting as precedent the last to be served rule for removal in *Bailey*, characterized the subject district court's allowance of the second removal, after already remanding the same case, as a Reconsideration. 536 F.3d at 1205. "The district court also had jurisdiction to reconsider its earlier order to remand." 2008 WL 5237155 at *3 [2] (App. 1). Thus, while not only turning the "last served defendant" rule on its head by allowing a once previously remanded exact same substantive case to be removed a second time, the Eleventh Circuit determined Petitioner Hill's Motion to Remand the second case denial as a "reconsideration" decision.

The district court, however, had no jurisdiction to reconsider anything relating to its previous remand of this same case from the first remand event. The first removal was based on the lack of subject matter jurisdiction under 28 U.S.C. § 1441—there was no diversity of citizenship or federal question. Yet, Petitioner Hill's first Motion to Remand argued no diversity of citizenship and no federal question presented. (App. 8) (Dkt. 18-6, 12-15, 18-24) (Case

No. 2032). The district court in Case No. 2032 ordered Remand to State court because there was no opposition, thereby the arguments made by Petitioner Hill were "considered unopposed". Then the district court specifically denied the frantic-based improper Motion for Reconsideration of Remand by United Healthcare of Florida and Rx Solutions on February 26, 2008. (Dkt. 31) (Case No. 2032)

So the Eleventh Circuit just got it all wrong when it said the district court, after one remand to State court, the second time around when the same case was removed could deny remand as a "reconsideration" of the first remand! Yet, that same district court itself stated the Order denying Hill's Second Motion for Remand, as Petitioner contends of the exact same case—once before remanded—was not any reconsideration as "jurisdiction to reconsider the previous remand Order is lacking". (App. 5) (Dkt. 34-5) (Case No. 330) (Note: The district court specifically did not make any remand denial based on United Health Group's purported claim of an existent federal question. (App. 5) (Dkt. 34 at 10, n. 1)

CONCLUSION

The Court must accept jurisdiction, reverse the Eleventh Circuit and establish one uniform defendant removal rule for the entire country by sending this case properly back to its origins in State court thereby voiding the district court's improper, and without jurisdiction, ruling dismissing the substantive lawsuit with prejudice at the Complaint pleading stage.

Respectfully submitted,

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